

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

UNITED STATES OF AMERICA

v.

**4:19-CR-00582-BRW
4:22-CV-00413-BRW**

JIMMY DO

ORDER

Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Doc. No. 34) is DENIED.

I. BACKGROUND

Petitioner pled guilty to being a felon in possession of a firearm, and, on July 9, 2020, he was sentence to 110 months in prison.¹ He did not appeal.

In the pending motion, Petitioner asserts a claim of ineffective assistance of counsel based on an allegedly invalid indictment, based on *Rehaif v. United States*.²

II. DISCUSSION

There is a one-year statute of limitations for actions brought under 28 U.S.C. § 2255.³ Petitioner did not file an appeal, so his one-year period to file a § 2255 motion began on July 23,

¹Doc. Nos. 26, 31.

²139 S. Ct. 2191 (2019).

³28 U.S.C. § 2255, ¶6.

2020⁴ and expired on July 23, 2021. The motion was filed on May 9, 2022. Petitioner has provided no reasons that would warrant equitable tolling of the statute of limitations.⁵

Even if Petitioner's motion was timely filed, it is without merit. Although Petitioner asserts a claim for ineffective assistance, he does not specify what exactly his lawyer did that involved unreasonable professional judgment.⁶ Assuming his argument is that he did not seek dismissal based on *Rehaif v. United States*,⁷ Petitioner can establish neither deficient performance nor prejudice.⁸ First, the motion would have been meritless. A lawyer's failure to raise frivolous arguments does not support an ineffective assistance claim.⁹ Second, the indictment plainly states that Petitioner "had previously and knowing been convicted" of a felony.¹⁰ Third, Petitioner admitted he was a felon when he pled guilty. Finally, he had previously been sentenced to and served over a year in prison on several different occasions before pleading guilty in this case.¹¹

⁴Unappealed federal criminal judgments become final when the time for filing a direct appeal expires. See *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005). The time for filing a notice of appeal in a criminal case is 14 days after the entry of the judgment. See FED. R. CRIM. P. 4(b)(A).

⁵See *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005).

⁶*Strickland v. Washington*, 466 U.S. 668, 688-694 (1984) (holding that a defendant must identify the acts or omissions of counsel that are alleged to have been the result of unreasonable professional judgment and establish prejudice).

⁷*Rehaif v. United States*, 139 S. Ct. 2191 (2019).

⁸To prevail on an ineffective assistance of counsel claim, a petitioner must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 688-690 (1984).

⁹*Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¹⁰Doc. No. 3.

¹¹*United States v. Welch*, 951 F.3d 901, 907 (8th Cir. 2020) (finding that, following *Rehaif*, the defendant could not show his substantial rights were affected because he had previously "received and served several prison sentences longer than one year for felony

CONCLUSION

For the reasons set out above, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Doc. No. 34) is DENIED.

IT IS SO ORDERED this 10th day of May, 2022.

Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

convictions”).